DOCKET FILE COPY ORIGINAL

RECEIVED

APR - 7 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year	))))))))	MD Docket No. 94-19

COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its Comments in the above-captioned rulemaking proceeding regarding the new annual regulatory fees to be assessed to interstate common carriers under Section 9 of the Communications Act, as established by Section 6003(a) of the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act").[1]

Section 9(a) authorizes the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services, and international activities.[2] There is, however, an important corollary to the manner in which the new regulatory fees are assessed and paid. The Commission should declare, in its

---

[1] Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, MD Docket No. 94-19, Notice of Proposed Rulemaking (FCC 94-46), released March 11, 1994.

[2] Id.

No. of Copies rec'd 0+4
List ABCDE

Report and Order in this proceeding that the new regulatory fees are entitled to exogenous treatment for interstate carriers under price cap regulation.

Using the two-pronged test that the Commission has applied in reviewing requests for exogenous treatment of costs, the fees fall squarely within the classification of those costs which are exogenous: 1) the establishment of the fee payment obligation as well as the dollar amount of the fees are outside the control of the carriers upon whom the fees are imposed; and 2) the fees have a unique and disproportionate effect upon interstate common carriers.

The new regulatory fees result in a cost which is beyond the control of local exchange carriers ("LECs"). The assessment of the fees is triggered by the Commission's implementation of an Act of Congress. As such, it clearly falls within the definition of exogenous costs established by the Commission when it adopted the LEC price cap rules.[3] For LECs, a specific dollar amount per 1,000 access lines is established in the Schedule of Regulatory Fees.[4] Thus, as the Commission found to be the case with carriers' Congressionally-mandated contributions to the Telecommunications Relay Service Fund ("TRS Fund"), the

---

[3] In the LEC Price Cap Order, the Commission defined exogenous costs as those "costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers." Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6807 (1990).

[4] See Section 9(g), 47 U.S.C. §159(g).

costs are not within the control of the carrier from whom the contribution is required. As the Commission stated in its Telecommunications Relay Service ("TRS") proceeding:

> ...[C]ontributions are a requirement of the [Americans with Disabilities Act] as implemented by this Commission.... [C]arriers are unable to control the actual level of these costs because fund contributions are made as a straight percentage of gross interstate revenues, a percentage amount imposed pursuant to this docket. While gross revenues is a statistic that reflects a number of business decisions over which the carrier has control, the percentage figure that determines their contribution is a regulatory decision, similar to the levy of a tax.[5]

Similarly, the regulatory fees at issue here are assessed based upon a dollar amount per 1,000 access lines. While the number of access lines served represents a number of business decisions over which a carrier has some control, the carrier has no control over the dollar amount assessed per access line. The Schedule of Regulatory Fees has been established by Congress and may be modified from time to time by the Commission. Thus, BellSouth and other LECs have no control over the assessment of these fees.

Not only are the regulatory fees imposed by the 1993 Budget Act beyond BellSouth's control, but also these costs are not likely to be reflected in the price cap formula. Thus, the second prong of the exogenous test is also met. The regulatory fees have a unique and disproportionate

---

[5] Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order (FCC 93-463), released September 29, 1993, para. 18.

effect upon interstate common carriers. As the Commission observed in granting exogenous treatment to TRS Fund contributions,

> Fund contributions are also not likely to otherwise be reflected in the price cap formula because, while all businesses must comply with other titles of the ADA, fund contributions are unique to common carriers and are in addition to the other obligations imposed on all businesses by the ADA.[6]

In this instant case, the regulatory fees at issue are <u>not</u> imposed on business entities in general, but rather the class of businesses upon which the fee obligation is imposed is a narrow one: interstate common carriers. Thus, the fees are "unique" to such carriers and also "are in addition to...other obligations imposed on all businesses" in general.[7] Indeed, the new regulatory fees, in essence, constitute user taxes not unlike those which the Commission has recognized as qualifying for exogenous treatment in the past. The Commission has considered utility taxes imposed upon common carriers as exogenous because such obligations "uniquely or disproportionately affect common carriers."[8] As the Commission has observed,

> Utility-specific taxes are...difficult to distinguish from other types of exogenous costs named by the Commission, in that government action creates cost changes that no other type of business faces. Since price cap regulation was intended to simulate

---

[6] <u>Id</u>.

[7] <u>Id</u>.

[8] Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 473, 7 FCC Rcd 1486, 1487 (1992).

competitive conditions, risks, and rewards, but not to subject carriers to more risk than they would face under competitive conditions, exogenous treatment of utility taxes is consistent with the overall goal of price cap regulation.[9]

In light of the above, the Commission should declare, in its Report and Order in this rulemaking proceeding, that the new regulatory fees imposed by the 1993 Budget Act and administered by the Commission under the new Section 9 of the Communications Act may be treated as exogenous by the interstate common carriers upon whom such fees are imposed. Exogenous treatment is consistent with the Commission's price cap policies as well as the Commission's past determinations affording exogenous treatment for other governmentally-imposed fees such as TRS Fund contributions and utility taxes.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: ______________________

M. Robert Sutherland
Richard M. Sbaratta
Rebecca M. Lough

Its Attorneys
4300 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, Georgia 30375
(404) 614-4907

DATE: April 7, 1994

9 Id.